

No. 75-1459

Supreme Court, U. S.  
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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN F. SINGER, PETITIONER

— v. —

UNITED STATES CIVIL SERVICE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,  
*Solicitor General,*  
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*Washington, D.C. 20530.*

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**STATEMENT**

Petitioner was discharged from federal employment on the basis of charges relating to his homosexual activities and advocacy of homosexual causes. Petitioner then brought this action in the United States District Court for the Western District of Washington, challenging the propriety of his discharge on the ground, *inter alia*, that it violated his right of free expression under the First Amendment. The district court dismissed his complaint (Pet. App. 16a) and the court of appeals affirmed (Pet. App. 1a-15a; 530 F. 2d 247).

Petitioner was hired by the Seattle office of the Equal Employment Opportunity Commission ("EEOC") as a clerk-typist in August 1971. At the time he was hired he informed his supervisor that he was a homosexual (Pet. App. 2a).

For his first year of employment at EEOC, petitioner was on probationary status (*ibid.*).<sup>1</sup> In the spring of 1972, the Civil Service Commission (the "Commission") conducted an investigation to determine petitioner's qualifications and suitability for continued employment in the competitive service. His "employee appraisal" by EEOC evaluated his work as "superior" or "very good" (R. 9-10).<sup>2</sup> The Commission's independent investigation, however, revealed a number of pre-employment and post-employment homosexual activities of petitioner that raised questions concerning his fitness for federal service. The Commission informed petitioner that its investigation had revealed adverse information and invited him to appear for an interview to comment on or rebut such information (R. 11). Petitioner appeared at the interview accompanied by counsel and was informed of the nature of the adverse information and provided with a list of charges (R. 12-13; see also Pet. App. 2a-3a):

1. That during previous employment in San Francisco petitioner had "flaunted [his] homosexuality in the office" and had been observed kissing and embracing a man in front of the elevator in the building where he worked and kissing a man in the company cafeteria.

2. That also while in San Francisco petitioner had been quoted in a newspaper as replying to the question, "What's hard about your job?," as follows: "Putting up with the closet queens. I am the only openly gay person

<sup>1</sup>A probationary employee can be discharged if "his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment \* \* \*." 5 C.F.R. 315.804.

<sup>2</sup>"R." refers to the record on appeal.

in our office. Closet queens \* \* \* see me as a threat. They think I'll expose them. I won't."

3. That at EEOC he had admitted to his supervisor that he was "gay" and had made plain to other work associates by "statements and dress" that he considered homosexual activity appropriate and intended to continue it as a way of life.

4. That in September 1971 he applied for and was refused a license to marry another man, and that he unsuccessfully sought a judicial order requiring issuance of the license.

5. That the attempt to obtain a marriage license received wide coverage by the press and television.

6. That articles in the Seattle newspapers about the application for a marriage license included a reference to petitioner's employment at EEOC.

7. That petitioner's "name accompanied by [his] place of employment appeared as one of the individuals involved in the planning and conducting of a symposium \* \* \* entitled 'A New Approach Toward Mental Health and Civil Rights for Sexual Minorities' " sponsored by the Seattle Gay Community, of which petitioner was an organizer and leader.<sup>3</sup>

8. That he had sent a letter to the Commission stating in part that he was gay and worked for EEOC.

Petitioner, on May 26, 1972, filed an affidavit with the Commission, which did not attempt to deny, explain,

<sup>3</sup>Petitioner's name appeared in a brochure which is set forth at pages 41 and 42 of the administrative record. The brochure contains a list entitled "INDIVIDUALS AND AGENCIES INVOLVED IN PLANNING THE SYMPOSIUM." Listed under that caption is the following " \* \* \* John Singer—Equal Employment Opportunity Comm. \* \* \*."

or rebut the substance of the charges, except to state that petitioner had not "specifically authorized" identification of his federal employment in connection with those activities and that nothing in the charges indicated that his conduct warranted discharge (R. 14; Pet. App. 3a-4a).

Thereafter, by letter dated June 26, 1972 (R. 15-16), petitioner was notified that the Commission had determined that his continued employment would "not serve to promote the efficiency of the service." The letter stated (R. 16):

In determining that your employment will not promote the efficiency of the service, the Commission has considered such pertinent factors as the potential disruption of service efficiency because of the possible revulsion of other employees to homosexual conduct and/or their apprehension of homosexual advances and solicitations; the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among youth; the possible use of Government funds and authority in furtherance of conduct offensive to the mores and law of our society; and the possible embarrassment to, and loss of public confidence in, your agency and the Federal civil service.

The Commission directed EEOC to separate petitioner from federal employment within twenty days (R. 17).

Petitioner appealed to the Commission's Seattle Regional Office (see R. 20). Appended to the appeal was a petition signed by the District Director of EEOC and petitioner's fellow employees that stated that petitioner had performed his duties well and that "[t]here is absolutely no evidence that he has ever offended a member of the public in his duties in this office"

(R. 18). The initial discharge determination was affirmed on administrative appeal, by both the Commission's Regional Office and, subsequently, its Board of Appeals and Review. In announcing its decision, the Board stated (R. 28; Pet. App. 22a):

There is evidence in the file which indicates that [petitioner's] actions establish that he has engaged in immoral and notoriously disgraceful conduct, openly and publicly flaunting his homosexual way of life and indicating further continuance of such activities. Activities of the type he has engaged in are such that general public knowledge thereof reflects discredit upon the Federal Government as his employer, impeding the efficiency of the service by lessening general public confidence in the fitness of the Government to conduct the public business with which it is entrusted.

Petitioner then brought this action, requesting injunctive and declaratory relief and, in an amended complaint, reinstatement to his former position with back pay. The district court held that the Commission's determination was supported by substantial evidence and dismissed the complaint (Pet. App. 16a).<sup>4</sup> The court of appeals affirmed, holding, *inter alia*, that the discharge had not violated petitioner's right of free expression under the First Amendment (Pet. App. 1a-15a).

#### DISCUSSION

Between the time of petitioner's discharge and the decision by the court of appeals, the Civil Service Commission changed its policy with respect to homosexual federal employees and applicants for federal

<sup>4</sup>Petitioner had sought to represent the class of all persons similarly situated, but the district court did not determine whether the suit was to be maintained as a class action.

employment. On December 21, 1973, the Commission issued a bulletin instructing supervisors and others engaged in suitability evaluation as follows (Pet. App. 12a, n. 14):

[Y]ou may not find a person unsuitable for Federal employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into public contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness—excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.

The Commission's regulations and "suitability guidelines" were subsequently amended to reflect this change in policy. See Pet. App. 12a-13a, n. 15.

The rationale stated by the Commission's Board of Appeals and Review in affirming petitioner's discharge—which rested on generalized conclusions that engaging in homosexual activity "reflects discredit upon the Federal Government as his employer"—would not, standing alone, be a sufficient basis for discharge under the amended regulations and suitability guidelines. But cf. note 5, *infra*. Under those guidelines there must be evidence and findings that the individual's homosexual conduct affects his job fitness; unsubstantiated conclusions concerning possible embarrassment to the federal service—the kind of conclusions stated by the Board in deciding petitioner's case—no longer can be relied upon to support the discharge of a federal employee. For this reason, the Commission has no prospective interest in the resolution of the issue raised by petitioner in this case, *i.e.*, whether a federal employee

may be discharged for the public advocacy of homosexuality *per se*.

The Commission's change in policy resulted from its consideration of a line of judicial decisions clarifying the rights of homosexual public employees, beginning with *Norton v. Macy*, 417 F. 2d 1161 (C.A. D.C.), and culminating in *Society for Individual Rights, Inc. v. Hampton*, 63 F.R.D. 399 (N.D. Calif.), affirmed on other grounds, 528 F. 2d 905 (C.A. 9). Since the change in policy occurred prior to consideration of petitioner's case by the court of appeals, the Commission has determined that petitioner should be afforded the benefits of the new regulations and guidelines, including reinstatement with back pay if, upon administrative reconsideration of the facts of his case, it is determined that those facts would not warrant petitioner's discharge under the new standards.<sup>5</sup> Accordingly, petitioner's claim that his discharge under the superseded regulations violated his right of free speech appears to be moot and plainly does not warrant review by this Court.

In view of these considerations, it would be appropriate for this Court to vacate the judgment of the court of appeals and remand the case to the Commission for reconsideration under its new regulations and guidelines.

<sup>5</sup>Although petitioner suggests (Pet. 10, n. 4) that he "would be discharged under administrative construction of the new regulation," that conclusion is both speculative and premature. Upon closer investigation of petitioner's activities, especially those in connection with the symposium for which petitioner may have listed his federal employer as a sponsor (see note 3, *supra*), the Commission may or may not determine that petitioner's discharge was warranted under the new regulations.

**CONCLUSION**

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the Civil Service Commission for further proceedings.

Respectfully submitted.

**ROBERT H. BORK,**  
*Solicitor General.*

**JULY 1976.**